Telecommuting Part 1: Pitfalls and Possibilities

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TELECOMMUTING: LEGAL ISSUES WHEN EMPLOYEES WORK FROM HOME

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I. TELECOMMUTING: THE BIG PICTURE

1) Telecommuting Defined

   a) What is Telecommuting?

   i) An alternative work arrangement for employees to perform work away from the primary workplace.

   ii) Telecommuting uses technology to transport information (as opposed to people) to and from the workplace.

   iii) The telecommuting schedule can be fixed (full time or part time) or episodic/situational.

   b) Telecommuting vs. Telework

   i) Although the terms are often used interchangeably, the International Telework Association and Council (ITAC) distinguishes between the terms “telecommuting” and “teleworking.”

   (a) Telecommuting is a more restrictive definition, meaning the use of telecommunications to avoid commuting to the traditional office. (This work-at-home variety of telework is the dominant form).

   (b) Telework is a broader term meaning the use of telecommunications to work wherever necessary to satisfy client needs, as long as the employee remains connected to the primary office site. (The alternative site could include a home office, telework center, satellite office, a client’s office, an airport lounge, or a hotel room).

2) The Private Sector Telecommuting Boom

   a) Only about 500 United States organizations offered telecommuting in 1991. In 1992, between 6% and 30% of organizations had telecommuting options. By 1994 over 70% of large employers offered some employees a telecommuting option, including one-third to one-half of all Fortune 500 firms.¹

b) In 1999, Hewlett-Packard reported that nearly 10% of its 60,000 employees were telecommuting, IBM reported 20%, and Cisco Systems reported 66%. AT&T reported 55% of managers telecommuting.2

c) According to ITAC, there were 42 million U.S. teleworkers in 2003.3

d) The Stanford Institute for the Quantitative Study of Society estimates that at least 32.3 million people (25% of the workforce) will be telecommuting by 2005, and longer range studies predict that by 2030 the American telecommuting population will contain 51 million people.4

3) Drivers of Telecommuting

   a) Technological innovations make telecommuting feasible

   b) Environmental/societal considerations

      i) Telecommuting can reduce air pollution and traffic congestion and conserve scarce resources.

         (1) The National Environmental Policy Institute (NEPI) estimates that allowing 10% of the
             nation’s workforce to telecommute just one day a week would eliminate 12,963 tons of
             air pollution and save more than 1.2 million gallons of fuel each week.5

         (2) The Texas Institute of Transportation found that the combined time wasted by workers in
             Los Angeles, Houston, Denver, Philadelphia, and Washington, D.C., totals 1.261 billion
             hours of sitting in traffic.6

      c) Emergency response and emergency preparedness

         i) In the aftermath of 9/11, telecommuting became a necessity for displaced workers and a way
            in which traumatized workers could continue to work. The events of 9/11 also painfully
            highlighted a need to “decentralize intellectual property.”7

         ii) Telecommuting has also become increasingly critical to emergency preparedness and
             continuity of operations (COOP) response plans by allowing the federal government to remain
             responsive to the nation and private businesses to continue to operate at all times.

   d) Cost concerns and employee demands

      i) Companies are facing tight labor markets, limited office space, and global competitive
         pressures to reduce operating costs.

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4 Michelle A. Travis, *New Perspectives on Work/Family Conflict: Telecommuting: The Escher Stairway of
6 Texas Transportation Institute, at http://tti.tamu.edu (last visited June 30, 2004).
7 Amy Joyce, *Getting in Gear to Telecommute: Interest in Work-at-Home Options Is Up Since Terrorist
ii) Employees are demanding more flexibility in their jobs and additional time to be at home with families. Telecommuting is seen as an effective compromise for working parents and a way of providing new opportunities for underemployed segments of the workforce.

iii) Companies are being compelled to offer telecommunication to successfully recruit, retain, and replace scarce skilled workers.

4) **Other Telecommuting Benefits**

a) *Overall, results have been successful:* telecommuting has resulted in lower business costs, reduction of absenteeism, greater productivity and efficiency, enhanced job satisfaction and employee morale, and a better ability to comply with regulations.\(^8\)

i) *Decreased need for office space through full and part time telecommuting, which can lower fixed costs for real estate, rent, utilities, and overhead*\(^8\)

ii) *Reduction of worker absenteeism*

(1) A study by the American Management Association found telecommuting reduced absenteeism costs by 63% (an average of $2,000 saved per employee). A study of the general workforce showed that telecommuting could reduce the amount of lost work time associated with sick or miscellaneous leave by 50% or more.\(^9\)

iii) *Improved worker satisfaction*

(1) Telecommuting often means higher worker productivity and less employee turnover, which reduces recruiting and retraining costs and facilitates recruitment of new employees.

(2) Studies have suggested telecommuting can increase a worker’s productivity between 8%-40% and telecommuters average 15%-30% higher productivity than their on-site counterparts.\(^10\)

(3) The 2000 AT&T Employee Telework survey (consisting of interviews with 1238 managers) shows that 67% of teleworkers who reported receiving a competing job offer

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\(^12\) Travis, *Equality in the Virtual Workplace, supra* note 9, at 365.
expressed giving up an “AT&T telework environment” as a factor in their decision to turn down the offer, and 66% of all AT&T managers report that telework is an advantage in keeping and attracting good employees.

5) Telecommuting Drawbacks

a) Work environment

i) Some workers prefer collaboration with colleagues and feel isolated, alienated, and unsupported when working at home. Workers may also lack the independence, motivation, and commitment to work effectively from home.

b) Job requirements

i) Telecommuting is not suitable for jobs requiring face-to-face communication or the use of on-site equipment.

c) Resistance to changes in managerial methodology

i) A belief that “out of sight means out of control.”

d) Technological difficulties

i) Technology can be adopted too rapidly before workers are properly trained or the level of available technical support is adequately increased.

e) Data security and confidentiality issues

f) Privacy concerns associated with employer or government-sponsored OSHA inspections of private residences

g) EEOC exposure regarding equitable selection of teleworkers vs. non-teleworkers

h) Costs involved in setting up telework arrangements

i) Creation of a greater “digital divide” and decreased employment opportunities for those lacking a technological education or the means to access either computers or the internet

II. TELECOMMUTING: LEGAL AND REGULATORY ISSUES—Evolving information technology enables increasingly effective work from home, but it challenges conventional notions of how work is structured. Currently, there is uncertainty about the degree to which the responsibility for health, safety conditions, and workers rights in traditional worksites extends to home worksites.

1) Occupational Safety and Health Act of 1970 (OSH Act)\(^{12}\)

a) Background

i) The Occupational Safety and Health Act of 1970 (OSH Act) is “the primary federal law regulating workplace safety and health.”\(^{12}\)

The Occupational Safety and Health Administration (OSHA) administers the OSH Act, which mandates that an employer must keep its place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

(1) To establish a violation of the OSH Act, OSHA must demonstrate three things: 1) the existence of a hazardous condition at the workplace; 2) the employer either knew or should have known about the hazard; and 3) the employer failed to correct the hazardous condition in compliance with appropriate OSHA standards.

(2) OSHA is “empowered . . . to inspect any workplace covered by the Act” to facilitate these regulations.

b) Telecommuting poses challenges for OSHA regulation

i) It may be somewhat difficult to balance an employee’s right to privacy with the employer’s duty to ensure compliance. Additionally, OSHA places an affirmative duty on employers to correct hazards the employer “is or should be aware of.” In the context of home offices, something like replacing faulty computers is easy, while replacing faulty wiring or unsafe stairs leading to the employee’s office is a much more substantial undertaking.

c) Uproar over OSHA regulation

i) In response to a Texas corporation’s request for guidance about its work-at-home programs, OSHA, in 1999, posted an advisory letter on the internet outlining strict policies that placed a seemingly new burden upon employers to ensure the safety of home-based sites.

(1) The guidelines stated that “[a]ll employers, including those which have entered into ‘work at home’ agreements are responsible for complying with the OSH Act and with safety and health standards.” An employer’s duty was said to include “reasonable diligence” to identify in advance possible hazards associated with particular home-based work assignments, and, once those hazards had been identified, to provide necessary training, personal protective equipment, and other appropriate controls for employee protection, including ensuring that equipment was ergonomically sound, and, under some circumstances, conducting on-site examinations of the working environment.

ii) When a front page Washington Post article first brought the policies to the public’s attention, furious criticism ensued from business leaders, employer groups, risk managers, insurers, and some lawmakers.

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15 Dutrow, supra note 13, at 958-59 (citing MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 436, 459 (2d ed. 1999)).
16 Id. at 959 (quoting MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 436, 436 (2d ed. 1999)).
18 Id. at 898-99.
Just one remark in a slew of criticism came from Senator Bond, a Missouri Republican, who called the OSHA proposal ridiculous, noting the potential that "mothers working at home, who need to step over a child safety gate, will now be considered in a hazardous work environment."  

iii) Labor Secretary Alexis M. Herman withdrew the letter a mere 48 hours after the release of the Washington Post article but maintained her position that "employers still must work to ensure ‘safe and healthful’ work conditions for [home-based] employees." 

iv) In the aftermath of the advisory letter, Congressional investigations were requested, and hearings and bills were proposed attempting to prohibit OSHA’s authority over telecommuting. A flurry of legislation was proposed during the 106th Congress, the primary concern being that telecommuting served valuable public purposes and employers would terminate telecommuting programs if they had to comply with traditional OSHA regulations. 

(1) In his New Freedom Initiative announced in February 2001, President Bush specifically referred to OSHA’s November 1999 advisory letter and proposed amending the OSH Act to prohibit its application in worksites where employees use telephones, computers or other electronic equipment to work from home. Bush asserted that applying the OSH Act to home offices would “have had a chilling effect on teleworking, as employers would seek to avoid potential liabilities.”

**d) OSHA’s Stance**

i) In 2000, Charles M. Jeffress, the Assistant Secretary of Labor for OSHA set out seven major points on employers’ responsibilities for work performed at home:

(1) 1) OSHA believes the OSH Act “does not apply to an employee’s house or furnishings”; 2) OSHA does not, and will not, inspect home offices; 3) Employers who are required to keep records of work-related injuries still need to include those that occur in a home office; 4) OSHA will not hold employers “liable for work activities in employees’ home offices”; 5) OSHA will only conduct inspections of hazardous home workplaces, such as home manufacturing, when OSHA receives a complaint or referral indicating that a safety or health violation exists or when a work-related fatality has occurred; 6) OSHA will enforce workplace health and safety rules at home-based manufacturing or other non-office work facilities where hazardous materials, equipment, or work processes are provided or required to be used in the employee’s home; and, 7) employers are not expected to inspect home offices.

(2) Jeffress also unequivocally stated in his testimony that “the bottom line is, as it has always been, that OSHA will respect the privacy of the home and expects that employers will as well.” Additionally, top-ranking OSHA officials offered assurance that OSHA had no intention of applying any ergonomics rule it might issue to home office workers.

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21 Dutrow, supra note 13, at 962 (quoting Kelly Dunn, Is OSHA Leaving Home?, 79 PERSONNEL J. 26 (2000)).
23 Id.
e) OSHA’s statements still leave some major issues unresolved, and it is unclear whether OSHA’s stated compromise position will alleviate liability concerns.25

i) One major purpose in enacting OSHA was to protect workers from unsafe work environments, regardless of the occupation or work location. Accordingly, the Act was not limited to traditional worksites, and, in fact, Congress left the term “workplace” undefined.26 Although OSHA has presently minimized its authority, employers still have a responsibility to protect home workers from unsafe working conditions and equipment. As Jeffress identified, balancing the privacy of the home and the employee with the employer’s duties under OSHA regulations could be a major hurdle to telecommuting.

ii) OSHA’s reporting regulations still apply to any employee injury occurring at home and arising from job-related activities. OSHA indicated that “home offices” will not be inspected, but “other home-based worksites” will be inspected if the agency receives notification of a potential violation.

(1) It may be difficult to distinguish between a home office and work performed in the home—although OSHA mentions home manufacturing as the type of in-home activity that is subject to agency inspection, home-based worksites are broadly defined by OSHA as “[t]he areas of an employee’s personal residence where the employee performs work of the employer.”27 This broad definition leaves open the potential for inspection of a broader range of in-home activities.

(2) OSHA has not indicated who has authority to make a complaint or whether complaints from particular sources will be taken more seriously than others.

iii) Even though OSHA has indicated that it will not inspect homes or require employers to inspect homes, it is recommended that employers be familiar with the employee’s home setup, to serve as an early warning signal and avoid future injuries. One alternative to actual visitation could be requiring the employee to submit photographs of the work area. (3M requires at least five photos of the home worksite taken from different angles).

iv) The types of jobs most telecommuters perform at home are unlikely to create substantial risk of fatality or serious injury; there are no known claims of fatalities or serious injury occurring at the homes of telecommuters arising from employment activities.28 Without evidence of a quantifiable health and safety risk, it is unclear to some why there should be an interest in agency regulation of home worksites.

(1) OSHA has long-been concerned about the potential for repetitive motion-related musculoskeletal disorders, but Congress, recently, under the Congressional Review Act of 199629 (CRA), overturned OSHA’s ergonomics standards, citing a lack of proof that any real safety problem existed. President Bush also expressed his disapproval, calling an ergonomics rule “unduly burdensome.”

25 See Dutrow, supra note 13; Swink, supra note 17.
27 Home Based Worksites, OSHA Dir. NO. CPL 2-0.125 (Feb. 25, 2000).
v) Implementing these standards may violate the Fourth Amendment rights of private citizens.

   (1) An examination of challenges to other in-home administrative inspections may shed light on whether in-home OSHA inspection could be unconstitutional. *Camera v. Municipal Court*\(^{30}\) represents the prevailing view on administrative inspections. Here, where an individual was charged with violating the housing code by not allowing a warrantless inspection of his leased apartment, the Supreme Court held that administrative searches are not immune to the Fourth Amendment’s warrant requirement. The Court suggested, though, that the threshold for cause might be lower in these types of cases and proposed a balancing test to determine whether there was probable cause to justify issuing a warrant.\(^{31}\) In outlining the balancing test, the Court stated that “the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.”\(^{32}\)

vi) The strong congressional opposition to the idea of OSHA regulation in the home, and legislative history showing the OSH Act was originally intended to regulate *industrial* worksites\(^{33}\) raise the concern that OSHA may have overreached its rulemaking authority by attempting to regulate home worksites.

vii) Finally, on a practical note, OSHA does not have the time or manpower to inspect the number of regular factories or worksites to which it already has access, so it is doubtful that OSHA would ever inspect homes, even if it wanted to. But potential for other federal or parallel state actions (such as workers’ compensation) still exists.

   (1) As Secretary of Labor Elaine Chao stated: “It is impossible to inspect every workplace with [OSHA’s] limited budget. The money is more effectively spent, and protects more workers, if it is focused on prevention efforts. Prevention, education and training are the most effective methods for providing the maximum amount of protection to the greatest number of workers.”\(^{34}\)

   (2) Using liability waivers and workers’ compensation remedies to handle the potential problem of injuries while working at home, as well as effective screening of candidates, training, and education of both employers and employees, may be successful methods for managing private programs.\(^{35}\)

2) **Workers’ Compensation**

   a) Workers compensation statutes were enacted in an effort to provide “adequate, predictable, and efficient remedies” for employees who had suffered work-related injuries or disease.\(^{36}\)

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\(^{30}\) 387 U.S. 523 (1967).

\(^{31}\) *Id.* at 535, 538.

\(^{32}\) *Id.* at 535.

\(^{33}\) Dutrow, *supra* note 13, at 959.


\(^{35}\) See Dutrow, *supra* note 13, at 990.

\(^{36}\) *Id.* at 987 (quoting MARK A. ROSENTHAL ET AL., EMPLOYMENT LAW 436, 536 (2d ed. 1999)).
b) Analysts speculate that a major battle on the horizon of workers’ compensation law is whether an injury or illness occurring during home-based employment will be treated as an injury arising out of and in the course of employment.\textsuperscript{37}

c) Workers’ compensation is governed by state statute, so each state may have different provisions.

i) In order to receive workers’ compensation in most states, an employee must prove that he suffered a personal injury arising out of and in the course of employment, and the injury must be related in time, place, and circumstance to the employer’s business. In order to be compensable, the work incident need only be a substantially contributing cause of an injury, not the sole cause.

d) Workers’ compensation statutes differ from the OSH Act in that: 1) they are state laws; 2) they are rehabilitative (designed to compensate an injury or illness that has already occurred) rather than preventative; 3) workers’ compensation provides a no-fault, or strict liability remedy, whereas OSHA imposes a duty on employers to provide a safe workplace; and 4) workers’ compensation is delivered directly to the worker, while relief from OSHA violations manifests in less tangible employee benefits, such as employer fines or enhanced company compliance.

e) Employees who do part of their work at home have been examined under the “going and coming rule,” the “traveling employee exception” and the “dual purpose doctrine,” but, as of 2002, no state had passed legislation on how workers’ compensation laws should apply to telecommuters, and no court had considered specifically a telecommuter’s claim for workers’ compensation benefits for injuries suffered at the home.

f) Analogies can be drawn, through, from various lines of legislation and case law relating to other employment situations.

g) The following summarizes the current status of workers’ compensation law as applied by analogy to telecommuters.\textsuperscript{38} Liability issues arise during the course of work, during travel, and during preparatory or incidental activities and breaks.

i) Liability during the course of work

(1) Workers’ compensation may focus on the appropriateness of the workspace itself—at home, most people do not have ergonomically correct workstations, which could lead to carpal tunnel syndrome or other forms of repetitive motion trauma.

(2) Aggravation or acceleration of a preexisting condition constitutes a personal injury under workmen’s compensation law.\textsuperscript{39}

(3) And trips and falls or other injuries sustained at the home office while actively engaged in work for the employer could create liability.

(4) Analogy to current law—It seems clear that accidental injuries occurring while actually working at a computer during working hours would be covered by workers’ compensation based on a principle of fairness as to similarly situated employees.

\textsuperscript{37} Swink, \textit{supra} note 17, at 873-74.

\textsuperscript{38} \textit{Id.} at 873-886.

\textsuperscript{39} Johnson v. Armour & Co., 210 N.W.2d 247, 248 (Minn. 1973) (per curium).
ii) Liability during travel

(1) The potential for liability also arises when telecommuters leave their home-office to pick up or drop off work from the main office worksite.

(2) Analogies to current law

(a) The “going and coming rule” holds that accidents that occur during travel between an employee’s home and an employer’s workplace are not considered to arise out of or in the course of employment and so are not covered by workers’ compensation.\(^{40}\) The logic behind this rule is that the employee is not actually on the premises, and, therefore, not within the workers’ compensation place requirement during this travel.\(^{41}\)

(b) But, this rule generally applies to employees with one established worksite and fixed hours; the “employer’s premises” may be broadened if the home has been established as a “second jobsite.”

(c) Exceptions to the “going and coming rule”

(i) The “traveling employee exception” to the going and coming rule applies to situations when an employer requires an employee to a) travel to a location other than the employer’s worksite or b) when the nature of the job requires performance outside of the employer’s business premises.\(^{42}\)

1. The two key factors used to determine whether injuries arose out of or in the course of employment are: 1) the reasonableness of the conduct that the employee was engaged in when injured, and, 2) whether the conduct might normally be anticipated or foreseen by the employer.

2. Employees regularly engaged in travel in furtherance of their employer’s business tend to be continuously covered by workers’ compensation from the time they depart home until their return. Traveling employees are considered to carry their “employer’s premises with them while engaged in furtherance of the employer’s business.”\(^{43}\) This coverage holds even if the employee is engaged in reasonable relaxation or recreational activities after working hours.\(^{44}\)

\(^{40}\) Swink, supra note 17, at 875 (citing ARTHUR LARSON & LEX LARSON, LARSON’S WORKER’S COMPENSATION LAW § 13.01 (2000)).

\(^{41}\) In Santa Rosa Junior College v. Workers’ Comp. Appeals Board, when a community college instructor was killed in an automobile accident on his way home from campus, no compensation was allowed even though the instructor had papers with him that he had intended to grade at home. The court concluded that unless an employee is required “to labor at home as a condition of the employment—the fact that an employee regularly works there does not transform the home into a second jobsite for the purposes of the going and coming rule.” 40 Cal. 3d 345, 348 (1985).

\(^{42}\) Swink, supra note 17, at 876 (citing ARTHUR LARSON & LEX LARSON, LARSON’S WORKER’S COMPENSATION LAW § 14.01 (2000)).


\(^{44}\) Voight v. Rettinger Transp., Inc., 306 N.W.2d 133, 137 (Minn. 1981).
3. This exception suggests that telecommuters will be covered when en route to pick up or drop off work materials, information, or assignments from the employer’s worksite, particularly if this travel is foreseeable because it has been directed by the employer or it is implied in the employment contract. If, however, an employee makes a spontaneous decision to go to the office (for example, if work or assignments are normally e-mailed or faxed), coverage may be less likely (although this activity could also be viewed under the “personal comfort doctrine” if foreseeable to the employer or if the trip aids in the efficiency of the employee).

(ii) “Dual purpose doctrine”

1. The dual purpose doctrine says that if a trip is business related and would have continued even without the private errand, then an injury is compensable. Conversely, if the trip would have continued without the business errand and would have been cancelled if the private purpose could not have been accomplished, then the trip is not compensable.45

2. Thus, it seems that a telecommuter conducting personal errands during the same time frame as dropping off or picking up materials would be covered under the “dual purpose doctrine” for any injuries suffered while on personal business.

(iii) “Second worksite rule” and rule allowing travel between two parts of the employee’s premises

1. Compensation is almost always awarded when the employee travels between two portions of the employer’s premises, whether going or coming or actively engaging in duties.

2. If it can be said that the home has become part of the employment premise because of work duties associated with the home, then it is possible to invoke the rule that travel between two parts of the employer’s premise is in the course of employment.46

   a. The placing of employment equipment (such as computers) or reimbursements for phone calls in the home by the employer is clear evidence that the home is a part of the work premises.47

3. Therefore, telecommuters injured on their way to the employer’s worksite to pick up or drop off work and then return home seem to be clearly exempted from the “going and coming rule” under the “second worksite rule,” given the regular pattern of performing work at home, the presence and usage of

46 In Rogers v. Pacesetter Corp., an employee was injured driving home from a meeting at a bar with his employer. Testimony showed that the employee regularly did work at home, and the employer knew of the practice and approved of it. As a result, the court held that the travel was between two employment locations and the injury was compensable. 927 S.W.2d 540 (Mo. Ct. App. 1988).
work equipment in the home, and the special arrangement that placed them in the home initially.

iii) Liability during preparatory or incidental activities and breaks

(1) Coverage of accidental injuries occurring in non-work areas of the house during working hours, or in work areas during non-working hours seems less obvious. Coverage likely will hinge on the reasonableness and foreseeability of the employee’s activities at the time of the injury and whether the employee was engaging in activities in “preparation of,” “incidental” to, or “during the performance of” the employer’s work.

(2) Preparatory/incidental activities

(a) Analogies to current law

(i) Despite the time element of the “in the course of” requirement, employees who work during fixed hours are covered for a reasonable interval before and after official working hours while the employees are on the premises and engaged in preparatory or incidental activities. The activity need not be “necessary,” only reasonably incidental to the work.\(^48\)

(ii) Compensation has been granted when the employee was injured during a trip to the toilet fifteen minutes before work began,\(^49\) when arriving thirty minutes early,\(^50\) while placing a lunch on a table before clocking in,\(^51\) in the process of changing clothes,\(^52\) while washing hands before going to lunch,\(^53\) and during a trip to the time clock.\(^54\)

(iii) It seems clear that telecommuters would be covered for similar sorts of preparatory and incidental activities, including meals, stretching of legs, trips to the bathroom, getting a cup of coffee, or attending to domestic concerns.

(3) Breaks:

(a) Breaks from work can be divided into three categories: accidents occurring on premises during breaks, accidents occurring off premises during breaks, and accidents occurring during non-fixed work hours.

(b) Analogies to current law

(i) On- and off-premise breaks

\(^48\) In *Ae Clevite, Inc. v. Labor Commission*, a work-at-home district sales manager was compensated when he suffered injuries after falling on his icy driveway while salting it in anticipation of the delivery of work-related materials. The court found that the claimant’s injuries arose in the course of his employment because the activity was reasonably incidental to his work, and the injury arose from a risk associated with his work for the employer due to the “work-at-home” arrangement. 996 P.2d 1072 (Utah Ct. App. 2000).


1. “Personal comfort doctrine”—technically personal acts, not of service to the employer, but performed at work, are considered incidental to service and, therefore, compensable if they are necessary to an employee’s life, comfort, or convenience. Such acts have included swimming to cool off during a paid break,\(^55\) seeking warmth,\(^56\) coolness,\(^57\) toilet facilities,\(^58\) getting a drink of water, sleeping, or smoking.\(^59\)

2. In *Jordan v. Western Electric Co.*\(^60\) the court refused to establish a comprehensive “coffee break” rule but outlined a case-by-case consideration of variables including duration, distance, type of activity, and amount of authority retained by the employer during the interval.

3. Under these rules, it seems telecommuters would be covered on breaks, since the in-home location of the work makes in-home rest and meal breaks both reasonable and foreseeable to an employer. Because traditional employees have been covered on an unpaid, unsupervised lunch in a cafeteria operated by the employer on its own premises,\(^61\) it seems telecommuters would be covered while eating in other rooms of their home. Even telecommuters’ off-premises breaks will likely be covered by workers’ compensation if they aid in efficient employee performance and are somehow meaningfully limited, controlled, or foreseeable by the employer.

(ii) Non-working hours

1. Telecommuters are often not required to work fixed hours, which is part of the attractiveness of the arrangement. But this flexibility raises questions about at what point telecommuting employees are actually working and when they are preparing to work, taking a break from work, or simply off-duty.

2. Compensation has been granted for traditional employees when an injury has occurred at home during the performance of work, even though the claimant was working nontraditional hours in a nonoffice setting. This precedent suggests coverage for telecommuting employees.\(^62\)


\(^{56}\) Alma Canning Co. v. Hanna, 350 S.W.2d 166 (Ark. 1961).


\(^{58}\) Sudeith v. City of St. Paul, 298 N.W. 46 (Minn. 1941).


\(^{60}\) 463 P.2d 598 (Or. App. 1970). “[T]he course of employment is not considered broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee.” *Id.* at 601.

\(^{61}\) Lassila v. Sears Roebuck & Co., 224 N.W.2d 519 (Minn. 1974).

\(^{62}\) State Comp. Ins. Fund v. Workers’ Comp. Appeals Board, 45 Cal.Comp.Cas 253 (Cal. App. 4th 1980) (unpublished opinion) (holding that a college professor was covered when he slipped on some papers at home while preparing a syllabus for his class).
3) **Reasonable Accommodation under the Americans with Disabilities Act (ADA) of 1990**

a) The ADA requires employers to provide “reasonable accommodations” to the certain physical and mental limitations created by a disability.

b) The ADA applies to both public and private employers.64

c) To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate: 1) that he is a disabled person within the meaning of the ADA; 2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and, 3) he has suffered an otherwise adverse employment decision as a result of discrimination.65

d) An employer can avoid accommodating a disabled employee or applicant by demonstrating that the proposed accommodation would impose an undue hardship. An undue hardship exists when a proposed accommodation creates “significant difficulty or expense” for the employer.66

e) The Equal Employment Opportunity Commission (EEOC) issued a telework fact sheet in February 2003 explaining when employers should consider allowing an individual with a disability to telecommute as a reasonable accommodation under the ADA.67

i) EEOC Chair Cari M. Dominguez stated, “Advances in technology are making telework an increasingly important option for employers who want to attract and retain a productive workforce. For some people with disabilities, telework may actually be the difference between having the opportunity to be among an employer’s best and brightest workers and not working at all.”

ii) According to the 2003 EEOC fact sheet:

(1) Employers may use existing telework programs to accommodate an individual under the ADA, but this may necessitate waiving certain eligibility requirements (such as requiring employees to work for one year before they are eligible for the program), or otherwise modifying the telework program for someone with a disability who needs to work at home. Employers who do not have existing telework programs may still need to allow an individual employee with a disability to telecommute as a reasonable accommodation.

(2) “Interactive process”—after an employee requests telework, the employer and employee should engage in what is referred to as an “interactive process” under the ADA, whereby the two parties should discuss the reason why the employee’s disability necessitates telework and the extent to which job tasks can be performed from the employee’s home. Other issues to be considered include: supervision, the need for face-to-face interaction, whether telephone, fax, and e-mail can suffice to ensure timely communication with other employees, customers, and clients, and whether the work requires immediate access to

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64 Prior to the passage of the ADA, discrimination against individuals with disabilities was regulated primarily by the Rehabilitation Act, which applies only to federal employees and contractors, but courts generally view existing Rehabilitation Act precedent as persuasive in ADA cases.
65 Shaner v. Synthes, 204 F.3d 494, 500 (3rd Cir. 2000).
documents or information only available at the workplace. Another topic to address is whether the employee needs to work at home full time, or whether working at home on a part-time basis would accommodate the employee’s disability.

(3) According to the fact sheet, a reasonable accommodation only requires that an employee work at home to the extent that it is necessitated by the disability. And an employer can also make accommodations that enable an employee to work full time in the workplace rather than granting a request to work at home.

f) State and federal courts are not bound by the EEOC’s interpretation of the law, and, in its 1999 Enforcement Guidance, the EEOC even observed that “[c]ourts have differed regarding whether ‘work-at-home’ can be a reasonable accommodation.”

i) Majority view—presumption against requiring telecommuting as a reasonable accommodation.

(1) Fourth Circuit (quoting Sixth Circuit)—“except in the unusual case where an employee can effectively perform all work-related duties at home, an employee ‘who does not come to work cannot perform any of his job functions, essential or otherwise.’”

(2) Seventh Circuit (Vande Zande)—generally “an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home.”

(a) “We think the majority view is correct. An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced . . . it would take a very extraordinary case for the employee to be able to create a triable issue of the employer’s failure to allow the employee to work at home.”

(3) Eighth Circuit—an employer was not required to offer telecommuting as an accommodation under the ADA because allowing telecommuting would have necessitated the employer to hire a courier, which would have created an undue burden.

(4) Eleventh Circuit—even if a reservation sales agent, who had been experiencing severe allergic reactions to common chemicals at work, could perform her job from home, her request to do so was “unreasonable as a matter of law.”

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69 Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995) (holding that allowing an employee to work a number of hours from home and providing sick leave for the remainder was a reasonable accommodation without requiring the additional accommodation of telecommuting).
70 Id., at 545. The court added, the legislative history equates “undue hardship” to “unduly costly.” Id., at 543.
71 Morrissey v. General Mills, Inc., 2002 WL 1339850 (8th Cir. 2002) (unpublished opinion). “General Mills is not required to hire an additional employee to accommodate another employee’s disability. Id. at 844.
72 “General Mills is not required to risk compromising the confidentiality of internal information to accommodate an employee’s disability.” Id. (citing Hypes v. First Commerce Corp., 134 F.3d 721, 726 (5th Cir. 1998)) (noting that confidential documents could not be removed from the office and thus the employee was expected to review the documents at the office.). “We agree with the Tenth Circuit that ‘[a]n accommodation that would result in other employees having to work harder or longer hours is not required.’” Id. (citing Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995)).
Federal Circuit—attendance is a minimum function of any job, and “[a]n agency is inherently entitled to require an employee to be present during scheduled work time.”

ii) Other courts have presumed that telecommuting would be an unusual, although possible, accommodation.

1) D.C. Circuit—An employer’s rejection of telecommuting as a reasonable accommodation was upheld, but the court assumed employers were required to consider telecommuting as a reasonable accommodation. In this case, the particular job required an adherence to ongoing and inflexible deadlines that made off-premise employment impracticable; in fact, even the plaintiff admitted her tasks as a coding clerk could not be performed from home.

2) Second Circuit—Telecommuting was not a reasonable accommodation because attending meetings and interacting in person with colleagues was an essential function of the plaintiff’s assistant analyst job. But the court emphasized that in reaching its conclusion it had examined the specifics of the disability and the job duty rather than relying on a presumption against telecommuting as a reasonable accommodation. It noted that the request “appears at first glance to be reasonable because the employer’s business is computer research and development.”

3) While both of these cases have elements of a fact-based approach and avoid an explicit presumption against telecommuting, these courts still assume telecommuting is a disfavored accommodation and would rarely be appropriate. These courts remarked that “predictable attendance is fundamental to most jobs,” so telecommuting is appropriate only in the “unusual case.”

iii) A third set of courts have adopted a fact-specific approach and view telecommuting as a plausible accommodation.

1) Ninth Circuit—An employee with obsessive-compulsive disorder could not be excluded from participation in the employer’s telecommuting program based upon her poor attendance record, because there was evidence that the absenteeism was directly related to her disability. The court saw “no reason not to follow the approach taken by the EEOC in its Enforcement Guidance.” In examining the breakdown of the “interactive process,” the court also held that assuming the employee was a qualified individual with a disability, the employer had, as a matter of law, “an affirmative duty under the ADA to explore further methods of accommodation before terminating” the employee. Another

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74 Carr v. Reno, 3 F.3d 525, 530 (D.C. Cir. 1994). This case was under the Rehabilitation Act.
75 Id.
77 Id. at 226-28.
79 Carr v. Reno, 3 F.3d 525, 530 (D.C. Cir. 1994).
80 Humphrey v. Memorial Hospitals Ass’n, 239 F.3d 1128 (9th Cir. 2001).
81 Id. at 1137.
82 Id.
Ninth Circuit court stated, the “duty to accommodate” is a “continuing” duty that is “not exhausted by one effort.”

(2) D.C. Circuit—An employer must consider a requested accommodation of working at home. Here, a fact-specific determination was required to see whether the employee could perform the essential functions of her position at home and whether allowing her to work at home would impose an undue burden on the employer. The court also noted that the employer had an existing work-at-home policy, signaling that telecommuting was not facially unreasonable.

(3) Eastern District of Louisiana—The court used a fact-specific approach to note that most of the plaintiff’s work was ordinarily conducted outside of the office. Moreover, the fact that the employer allowed other claims adjusters to telecommute undermined the argument that a presence in the office was necessary and telecommuting would require an undue hardship. The court declined to adopt a presumption that telecommuting is only a reasonable accommodation in an extraordinary case.

(4) Connecticut—A district court rejected the Seventh Circuit’s “nearly per se rule” in *Vande Zande* as directly contrary to the “requirement of a case-by-case, fact-specific inquiry.”

(5) Pennsylvania—recently, a district court jury awarded $1.5 million to an insurance underwriter with Crohn’s disease who claimed her employer had at first accommodated her disability by allowing her to work from home while she was ill but later insisted she appear at the office two days a week and submit a different performance review schedule than her colleagues. However, the court granted a judgment as a matter of law and overturned the verdict, finding that the plaintiff did not engage in an “interactive process” with the defendant.

(a) Regarding the interactive process, the court stated, “Neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.”

iv) Even the language in the Seventh Circuit’s *Vande Zande* case may suggest that working at home may become a “reasonable accommodation” as communication technology advances—“most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed

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83 McAlindin v. County of San Diego, 192 F.3d 1226, 1237 (9th Cir. 2000) amended, 201 F.3d 1211.
84 Langon v. Dept. of Health and Human Servs., 959 F.2d 1053, 1060-61 (D.C. Cir 1992) (cited with approval in Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993)) (considering whether, under the Rehabilitation Act, a postal worker with AIDS must be transferred to another location where he could obtain better medical treatment).
88 Id. at 19 (quoting Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996).
at home without a substantial reduction in the quality of the employee’s performance. This will no doubt change as communications technology advances, but is the situation today.  

v) The presumption against telecommuting as an accommodation in cases such as Vande Zande has been criticized for the assumptions that an office presence is a necessary element of most jobs and that commuting results in decreased productivity due to a lack of supervision.

4) **Fair Labor Standards Act (FLSA) of 1938**

a) FLSA was passed to extend wage-hour requirements to cover all employers engaged in interstate commerce or the production of goods for interstate commerce and other selected types of businesses.

b) A covered employer is required to pay its nonexempt employees for all hours it allows employees to work, regardless of whether the employer has issued rules prohibiting additional work.

c) The fact that employees do not work on the premises of the employer is not a defense against claims that the employees have not been paid for all of their hours.

d) Although the FLSA’s “homeworker” exception might appear to cover telecommuters, the definition of “homeworker” is quite narrow, applying to the production of goods, not services, at the home.

e) Therefore, an employer permitting an nonexempt employee to telecommute is faced with a number of legal issues under FLSA. First and foremost, the employer must monitor the telecommuter’s hours and enforce its rules limiting hours. In addition, an employer should be wary of potential travel time that could be included if an employee must attend an office meeting. The employer should also be aware that for most exempt classifications, an employee must maintain a degree of independence and decision-making authority.

5) **Employee vs. Independent Contractor**

a) Classification as an independent contractor or employee affects the rights, responsibilities, and legal remedies for both the employer and telecommuter.

b) Classifying a telecommuter as an independent contractor rather than an employee could relieve an employer of some liability. In particular, employees but not contractors are generally protected from discrimination under the ADA, Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act. Additionally, certain wage, hour, unemployment, and workers’ compensation laws apply to employees but not independent contractors.

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89 Vande Zande v. Wis. Dept. of Admin., 44 F.3d 538, 544 (7th Cir. 1995).
94 29 C.F.R. § 785.12 (2004); see Reich v. Dep’t of Cons. & Natural Res., 28 F.3d 1076 (11th Cir. 1994).
95 29 C.F.R. § 530.1 (c)(d) (2004).
96 Swink, *supra* note 17, at 890-91.
c) The “right to control test,” the “economic reality test,” and the “hybrid test” are all used to distinguish between employees and independent contractors.97

d) The consequences of misclassifications are severe—upon a determination that an employer has erroneously classified an “employee” as an “independent contractor,” the employer may be liable for back federal and state payroll taxes, interest and penalties, unpaid overtime, and retroactive health coverage, participation in pension plans, and other employee benefits.98

e) The majority of companies employing telecommuters classify them as employees.

6) **Potential Tort and Contract Claims**

a) Liability for visitors to the home-based worksite.

   i) Employers may be able to use contract waivers to exempt themselves from liability (at least for non-business visitors). But liability exposure may increase if a telecommuter interacts with clients at the home, and either the employer has some control over how the home worksite is arranged or the injury is caused by equipment supplied by the employer.

   ii) A telecommuting employee still owes a legal duty of care to visitors (at least for social guests and family members). The employee would normally be protected through homeowners’ or renters’ insurance.

   iii) Tort claims arising from client visits at a home-based worksite could cause legal difficulties because witnesses are not present as they would have been at the traditional office and testimony cannot be given regarding “standard practice” at home.

b) Traditional tort claims for negligence based on an employer’s general duty of care may supplement any workers’ compensation provisions.

c) Products liability claims for malfunctioning equipment used at home.

d) Property damage issues.

e) Conversion of property after termination of a telecommuter’s employment and reimbursement of work-related expenses.

7) **Other Potential Legal Considerations:**

a) Income tax implications.

b) Insurance coverage.

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97 See Myra H. Barron, *Who’s an Independent Contractor? Who’s an Employee?*, 14 LAB. LAW. 457 (1999). The Restatement of Agency (Second) provides a typical definition to distinguish between the two: “A servant [common law employee] is a person employed to perform services in the affairs of another and with respect to the physical conduct in the performance of the services is subject to the other’s control or right of control.” Restatement (Second) of Agency § 220 (1958).

98 Swink, *supra* note 17, at 890-91.
c) Discrimination under Title VII of the Civil Rights Act\textsuperscript{99} in the selection and retention of telecommuters.

d) Employee privacy rights.

e) Security issues/disclosure of confidential information and trade secrets.

f) Intellectual property licensure and covenants not-to-compete.

g) Zoning regulations and licensure that restrict or forbid the operation of home businesses.

Legal Issues in Telecommuting

ASAE Annual Meeting
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Road Map
• Background on Telecommuting
• Legal Issues
  – OSHA
  – Workers’ Comp
  – ADA
  – FLSA
  – Employee vs. Independent K
  – Tort and Contract Claims
  – Other Issues
Background

• Definitions
  – Telecommuting—use of technology to avoid commuting to traditional office
  – Telework—broader term that encompasses telecommuting and other forms of off-site work that use telecommunications to connect to employer’s primary office

• Popularity of Telecommuting
  – By 1994, 70% of large employers offered some form of telecommuting
  – 42 million U.S. teleworkers in 2003 (International Telework Association and Council)
  – Studies estimate over 50 million people will be telecommuting by 2030.

• Drivers of Telecommuting
  – Technology
  – Environment/Energy Conservation
  – Emergency Preparedness
  – Employer Cost
  – Employee Retention/Recruitment
  – Increased productivity
Background

• Potential Problems with Telecommuting
  – Management challenges
  – Technology gaps
  – Data confidentiality/security
  – Employee privacy
  – Neutral selection criteria/decisions
  – Costs
  – Digital divide

Key Legal Issues

• OSHA
• Workers’ Comp
• Americans with Disabilities Act
• Fair Labor Standards Act
• Employee vs. Independent Contractor
• Tort and Contract Claims
• Other Issues

OSHA

• OSHA charged under OSH Act with protecting worker safety in American workplaces.
• Issues general and specific standards
• OSHA has power to inspect any workplace covered by the Act to enforce standards.
OSHA

• Telecommuting raises difficult OSHA issues.
  – Worker privacy versus employer duty
  – Lack of employer control over worksite
  – No specific standards

OSHA

• OSHA Mixed Messages
  – 1999 Advisory Letter on Internet
    • Would have imposed relatively strict duty on employers to identify in advance hazards associated with home-based work assignments and provide training, protective equipment, and other appropriate controls for worker protection, including inspections.
    – OSHA revoked letter in response to outcry from business and Congress—but Labor Secretary Herman said employers still required to provide safe work conditions for home-based employees.

OSHA

• OSHA Mixed Messages
  – In 2001, Bush Administration proposed legislation to limit application of OSH Act to home workplaces.
  – Concern that applying Act to home workplaces would have chilling effect on employers’ willingness to permit telecommuting.
OSHA

• OSHA Current Position on Telecommuting
  – OSH Act does not apply to employee's house or furnishings
  – OSHA will not inspect home offices
  – Employers need to keep records of work-related injuries that occur in home
  – OSHA will not hold employers "liable for work activities in employees' home offices"

OSHA

• OSHA Current Position on Telecommuting (cont.)
  – Will inspect hazardous home work sites only if complaints of violations or fatalities occur
  – Will enforce workplace health and safety rules at home-based manufacturing facilities where hazardous materials, equipment, or work processes are provided or required to be used in the employee's home
  – Does not expect employers to inspect home offices

OSHA

• Uncertainties Remain:
  – Distinction between home offices and hazardous home work sites
  – Room for more aggressive enforcement under OSH Act if administration changes
  – OSHA inspections may violate 4th Amendment restrictions on searches and seizures
Workers’ Compensation

- Key issue: Will an injury or illness occurring during home-based employment be treated as an injury arising out of and in the course of employment?
- Injury must be related in time, place, and circumstance to the employer’s business
- Work incident need only be a substantially contributing cause of an injury, not the sole cause.

Workers’ Compensation

- Workers’ comp awards go directly to employees; do not punish employers.
- But threat of increased premiums gives employers incentive to prevent workplace injuries.
- State laws unclear on application to injuries suffered while working at home. Must look at analogous doctrines for other employees.

Workers’ Compensation

- Liability during course of work
  - Types of injuries likely to be covered
    - Carpal tunnel and other repetitive motion injuries
    - Aggravation or acceleration of pre-existing injuries
    - Trips and falls in home office while working
Workers’ Compensation

• Liability during course of travel
  – injuries suffered during traditional commuting between home and work are generally not covered
  – but injuries suffered while dropping off work at main office may be covered if home is an alternative work site and telecommuting arrangement is formalized, employer supplies equipment and reimburses for work expenses
  – or if telecommuting employee qualifies for “traveling employee exception”

Workers’ Compensation

• Liability during course of travel
  – injuries may even be covered if suffered while performing errands on way to or back from dropping off work at main office under “dual purpose doctrine”

Workers’ Compensation

• Liability during incidental activities/breaks
  – Employees who work during fixed hours are covered for a reasonable interval before and after official working hours while the employees are on the premises and engaged in preparatory or incidental activities.
  – Telecommuters may be covered for similar sorts of preparatory and incidental activities, including meals, stretching of legs, trips to the bathroom, getting a cup of coffee, or attending to domestic concerns.
Workers’ Compensation

• Liability during incidental activities/breaks
  – Under “personal comfort doctrine,” personal acts, not of service to the employer, but performed at work, are considered incidental to service and, therefore, compensable if they are necessary to an employee’s life, comfort, or convenience.

Workers’ Compensation

• Liability during incidental activities/breaks
  – Telecommuters would likely be covered on breaks, since the in-home location of the work makes in-home rest/meal breaks both reasonable and foreseeable to an employer.
  – Even telecommuters’ off-premises breaks could be covered by workers’ compensation if they aid in efficient employee performance and are somehow meaningfully limited, controlled, or foreseeable by the employer.

Workers’ Compensation

• Liability for Injuries Suffered After Hours
  – Compensation has been granted for traditional employees when an injury has occurred at home during the performance of work, even though the claimant was working nontraditional hours in a nonoffice setting. This precedent suggests coverage for telecommuting employees working in home-based offices.
ADA

• The ADA requires employers to provide “reasonable accommodations” for persons with certain physical or mental disabilities who are otherwise qualified to perform the essential functions of the job unless doing so would create an undue burden (i.e., a significant difficulty or expense).

ADA

• EEOC’s Position
  – Employers may need to offer telework or modify existing telework programs to accommodate an employee’s disability.
  – Exact nature of arrangement should result from an interactive discussion or negotiation between employers and employees with disability.

ADA

• Courts
  – Have generally held that employers do not need to offer telework to accommodate a disability.
  – The majority of courts have adopted a presumption against requiring telecommuting as a reasonable accommodation—either because attendance at main work site is essential qualification for job or because doing so would create undue burden.
### ADA

- **Courts**
  - Other courts have presumed that telecommuting would be an unusual, although possible, accommodation.
  - A third set of courts regards telecommuting as a plausible accommodation based on specific facts and circumstances.
  - The majority rule may change as technology advances.

### FLSA

- Fair Labor Standards Act requires covered employers to pay its employees for all hours it allows employees to work, regardless of whether the employer has issued rules prohibiting additional work.
- FLSA has narrow exception for home workers relating to production of goods, but not services.

### FLSA

- Thus, FLSA applies to most telecommuters.
- To comply with FLSA, employers must:
  - monitor telecommuters’ hours and enforce hours
  - factor in travel time for meetings in main office
  - apply same criteria for determining whether telecommuter is an exempt employees as for other employees
Employee vs. Independent Contractor

- Determination that telecommuter is independent contractor could relieve employer of many legal obligations.
- Relevant tests: “right to control”, “economic reality” and “hybrid”
- Consequences of mistaken determination include liability for back federal and state payroll taxes, interest and penalties, unpaid overtime, and retroactive health coverage, participation in pension plans, and other employee benefits.

Tort and Contract Issues

- Tort liability to visitors and other third parties
  - Employers may have liability for business visitors
  - Employees retain legal duty of care for social guests and family members
  - Tort claims could create legal challenges
- Other tort and contract issues regarding equipment and property damage

Other Legal Issues

- Income tax implications
- Insurance coverage
- Discrimination in selection/retention of telecommuters
- Employee privacy rights
Other Legal Issues

• Security/privacy of confidential data and trade secrets
• Intellectual property licensure and covenants not-to-compete
• Zoning regs/licensure re operation of home businesses
Robert M. Portman is a partner in Jenner & Block’s Washington, D.C. office. He is Chair of the Firm’s Health Care Law Practice and a member of the Firm’s Association Practice.

Mr. Portman concentrates his practice in health and association law, focusing on certification law, administrative law, antitrust law, litigation, transactions, legislation, and regulation in the health care field. He represents a wide range of health care clients including a large number of national medical specialty societies, other health care associations, voluntary health organizations and certification bodies, as well as numerous individual physicians, physician practice groups and other health care providers.

Mr. Portman counsels his medical society, health care association, voluntary health organization and certification body clients on the full spectrum of legal issues facing these entities, including:

- Transactions, mergers and corporate restructuring
- Creation of nonprofit and for-profit affiliates
- Executive contracts and compensation issues
- Bylaws drafting and review and other governance issues
- Antitrust, tax and intellectual property
- Internet and e-commerce
- Consultant and vendor contracts
- Americans with Disabilities Act compliance
- Drafting and interpreting ethics and standard-setting policies and procedures, appeals and disciplinary procedures, and confidentiality, record keeping and other policies

He also represents these clients in legislative and regulatory matters, including legislative drafting and analysis, the filing of comments on administrative rulemakings before the Health Care Financing Administration, the Federal Trade Commission and the Food and Drug Administration. In addition, Mr. Portman represents association and certification clients in litigation against federal and state governments, as well as private parties. He regularly files amicus curiae briefs in the United States Supreme Court and other federal and state appellate courts in matters involving significant health care policy issues.
Mr. Portman advises physicians, practice groups and other health care providers on a variety of issues, including:

- Counseling with respect to HIPAA patient privacy rules
- Fraud and abuse investigations defense and compliance counseling
- Stark II self-referral and Medicare-Medicaid anti-kickback counseling
- Transactions with hospitals, other medical groups, individual physicians and vendors of medical equipment and supplies
- Practice sales and acquisitions
- Establishment and operation of integrated delivery networks, including physician-owned networks and physician-hospital joint ventures
- Advice and counseling with respect to employment, independent contractor and managed care agreements
- Personnel and other human resource issues
- Antitrust litigation and counseling
- Counseling and defense of litigation involving EMTALA
- State licensure and disciplinary matters
- Credentialing and privileges disputes with hospitals and managed care organizations
- Medical staff bylaws disputes

Mr. Portman rejoined the Firm as a partner in 1995 after serving two years as Special Assistant to Secretary of Labor Robert B. Reich and Deputy Assistant Secretary for Work and Technology Policy. During this time, he served as the secretary’s principal representative to the President’s task force on health care reform. Mr. Portman originally joined the Firm in 1991 after serving as executive officer of the Cook County State’s Attorney’s Office in Chicago for two years, where he directed the States Attorney’s Task Force on the Forgoing of Life-Sustaining Treatment. Prior to that he was an associate in another Chicago law firm from 1986-91.

Mr. Portman is an active member of the health law sections of the American Bar Association and the District of Columbia Bar Association, the American Health Lawyers Association, the American Society of Medical Association Counsel and the American Society of Association Executives. Mr. Portman is currently serving as Chair of the Steering Committee of the Health Law Section and Vice-Chair of the Council on Sections for the DC Bar Association. He has lectured and written numerous articles on health care, association and certification legal issues.

Mr. Portman received his B.A., *summa cum laude*, from Northwestern University in 1980 and his J.D., *magna cum laude*, from Harvard University in 1985. He also earned a masters in public policy from Harvard’s Kennedy School of Government in 1985. In addition, he was a visiting student at Yale Law School in 1984-85, where he was a finalist in the school’s Thurmond Arnold Moot Court Competition. Mr. Portman served as the first class of clerks for the Honorable Mark L. Wolf, United States District Court for the District of Massachusetts, in 1985-86. He is a member of the bar of the United States Supreme Court, the Illinois and District of Columbia Bars and the bars of numerous federal courts.
Telecommuting Part 1:
Pitfalls and Possibilities

Getting Started
How does an organization develop an alternative work arrangement program?

The more successful initiatives are those that involve staff in the design. A cross-organizational work group begins by identifying the frequency and extent of teleworking and/or the core hours for flexible work schedules.

The group identifies which positions are eligible for telework or alternative schedules. How to handle if more requests than department can accommodate?

Most organizations limit eligibility to staff with acceptable performance ratings, leaving individual decisions to supervisory discretion.

Input from the human resources staff is essential, as the policy must address Fair Labor Standards Act provisions, consider discrimination issues, and may need to redefine the concept of leave in a flexible work environment.

Many organizations use a trial period, 60-90 days, with re-evaluation 30-60 days into the period.

Organizations should establish agreements that define expectations for employees choosing an alternative work arrangement. For teleworkers, the agreement should address equipment and budget issues such as

- who provides office furniture for the home or off-site workspace,
- who owns it when the relationship ends,
- how supplies are provided,
- and how technical support is provided.

Other questions that need to be addressed:

- If the organization provides the computer, printer, and fax machine, is it appropriate for personal-use software to be loaded on it?
- If the employee provides the computer, how does the organization ensure hardware and software compatibility?
- Is technical support provided virtually or physically, at the employee’s home or must the equipment be brought into the home office?
- Are employees provided equipment for both the home and office sites?
- What about liability issues if an employee is injured while working at the off-site location?
- Is APA required to ensure ADA or other federal work environment regulations are met in home offices?
- Who pays for faxes, long-distance calls, courier or express mail services?
- What expenses will be reimbursed?
- Where are records stored?
- How will we handle records that are destroyed or lost at an employee's home?

Managers may need to develop new ways to manage information and communication. Studies show that communication is poorer in a virtual environment and will rarely be effective as face-to-face conversations. It may become harder to reach employees when...
needed, and with a variety of work schedules, scheduling team meetings becomes a challenge. The agreement should address whether information exchanges will be simultaneous or asynchronous.

- How will offsite and onsite employees access shared information?
- Are employees required to attend staff meetings, even if it conflicts with the flexible work schedule?
- How will employees be expected to manage the noise of the home during the working hours?
- Will employees be required to be available by phone, fax, e-mail, and/or instant messaging?
- What the meaning of vacation? Sick leave?
- What if employee cannot work due to technology breakdowns?
- How will a sense of team identity be built?
- How do employees build trust and organizational networks?
- How will managers evaluate unseen performance?
Telecommuting: Insurance & Risk Management Considerations for Executives

American Society of Association Executives Annual Meeting
Minneapolis, MN August 17, 2004
Overview

- Worker compensation, property and commercial general liability policies are intended to cover claims arising from a premise location:
  - defined within the policy; or
  - which insured temporarily rents, uses or otherwise occupies

The commercial insurance industry has not kept pace with the telecommuting trend.
What this means...

- Property policies insure property “temporarily away from the insured premise”
- Most general liability policies cover claims arising from an occurrence anywhere in the world

Regular and permanent use of the home *(not an insured location described in the policy)* precludes coverage in property, general liability and worker compensation policies maintained by most associations
Establishing HR/Risk Management Controls

- Important considerations
  - Home office environment
  - Hours and work space description
  - Association insurance
  - Loss scenarios
  - Employee personal insurance
Home Office Environment

- Occasional informal work from home
- Ongoing formal work from home
- Ongoing formal work from home with extensive travel
Hours & Work Space Description

- Does workspace designated in a telecommuting agreement require exclusivity or permit non-association use?

- Do you need a statement regarding work space conditions?
  - Hazard free/Code compliant/Permissible non-business use

- Flexibilities may vary among functions (editorial staff, membership staff, etc.)

Control varies according to type and amount of work
Association Insurance

- Commercial General Liability
- Property
- Worker Compensation
- Automobile
Commercial General Liability (GCL)

- Type and scale of liability exposure may be limited in a home office but the exposure remains.
- Employee homeowners insurance may not be relied upon for benefit of the association.

Legal doctrine of “respondeat superior”
(let the superior make answer)
Employer can be held liable for employee’s actions.
Property

- Technically, association property will not be covered unless the location is scheduled on the policy

Minimum premium requirements and applicable deductibles often mitigate the benefits of property insurance where limited values are at risk
Worker Compensation

- An employee working from home in a jurisdiction other than association’s office location creates a statutory requirement to insure the new payroll location.

No choices here
Employees using their personal vehicles for association business are required to maintain their own insurance.

Non-owned liability coverage exists for the benefit of the association.
Loss Scenarios

- 3rd party business guest
- Property damage to employee home or adjoining property
- Bodily injury to family member or other occupant of home
- Suspicious property and worker compensation circumstances
- Improper use of association computers
Risk Management

- No public liability if employee home office is not used to engage the public

- Any meeting at employee’s home office is an uncovered liability exposure to the association

- Commercial general liability (GCL) protects insured against liability claims and defense costs *but* principal beneficiary is an injured, unrelated 3rd party

Association decides whether and how employee may use home office
Risk Management

Work Schedules

- For employees, schedules may conflict with benefit of having home office opportunity
- For the association, specific work schedules may be necessary

Broad implications for insurance coverage availability

Was the employee really going to the post office when s/he had the automobile accident at 7:30 pm?
Risk Management

Use of Association Property

- HQ location policies, procedures and software can monitor and protect against pornographic or copyrighted material downloads

- Absent these controls, home-based offices create new risk management considerations for association managers

Improper use of employee@yourassociation.org can result in liability claims and financial obligations
Property Insurance

Most policies provide limited coverage for property that is

- temporarily away from insured premise, e.g., at the annual meeting
- in transit, e.g., at the airport, in your car, but not in the hands of USPS

Extend coverage for property situated permanently in a home office – otherwise it’s not covered property
Extending Property Coverage

- Carrier needs address of new “insured location” and brief description of contents and values.
- Cost is not prohibitive since property values typically are low.

Identify association property clearly -- insure only association property.
Commercial General Liability (CGL)

- Adding a home office as an insured location for CGL -- simple but more costly -- ~$250 - $400/home office location

- Employees benefit from the extension of coverage

It’s the association’s interests that are being protected
Worker Compensation

- State laws require all employers to provide Worker Compensation insurance for employees
- Requirements similarity among states, but not uniform
- Insurance premiums vary from state to state

Report payroll carefully to the insurance company – identify payroll $ amount earned in state where employee operates home office
Commercial Auto Insurance

- Association’s automobile liability and physical damage insurance does not cover home-based employee’s liability or employee’s vehicle for physical damage arising from employee’s business use of their own car.

- Association’s insurance also does not cover field employees who frequently use their own cars for association business.

An association may choose other options.
Auto Insurance Options

- Extend liability coverage to all employees (office-based, home-based, field) who use their own vehicles for official business (*a costly option in a large organization*)

- Provide liability coverage only to employees required to make substantial use of their own vehicles for association business

An association’s extension of insurance coverage is not a substitute for employees’ personal auto insurance – remind employees they must maintain their own
Employee Personal Insurance
Homeowners Insurance

- Underwriting and pricing based on domestic (non-commercial) activities
- Advise employees that “commercial exposure” of a home office may jeopardize insurance
- Homeowners carrier can issue endorsement allowing limited use of home for commercial purposes
- Cost of extending coverage for home office type perils ~$35 to $150/year

Some associations may elect to pick up additional premium
Employee Personal Insurance
Personal Automobile Policy

- Employees should disclose “business use” of personal vehicle to auto insurance carrier or jeopardize coverage in event of a claim
- Carrier can issue endorsement allowing limited “business use”
- Using personal vehicles for association business on a routine and extended basis may require commercial vehicle coverage
- Cost difference between personal and commercial coverage can be as much as 50% -- Premiums vary greatly based on many underwriting considerations

Associations may want to consider paying additional premium and fund deductible expense of physical damage claim arising from employee use of personal vehicle for association business
More and more associations are relying on employees (not contractors) who work out of their homes. In some cases employees work as field personnel in areas far removed from either the headquarters or branch office. Other associations are making affirmative decisions to situate employees, who are within reasonable commuting distance, in a workplace environment within the employee’s home. Associations are increasingly looking to such telecommuting arrangements for a number of reasons:

- lowers real estate expense
- accommodation to valued employees
- places employee closer to geography then association could otherwise do
- allows employees with regional travel responsibilities to have home as office base

The commercial insurance industry has not kept pace with this trend. Insurance policies, particularly worker compensation, property, and commercial general liability are intended to cover claims arising from a premise location either defined within the policy or which the insured temporarily rents, uses or otherwise occupies. Property policies, for instance, insure property “…temporarily away from the insured premise.” Most general liability policies cover claims arising from an occurrence anywhere in the world. It is the regular and permanent use of the home (not an insured location described in the policy) that precludes coverage in the property and general liability and worker compensation policies maintained by most associations.

This paper will raise a number of risk management issues, which association managers should consider in establishing their telecommuting policies. We will also examine the potentially uninsured exposures and offer suggestions for insuring uncovered perils. In addition we will look at the adverse impact that an employee’s commercial use of their home and family automobile may have on their homeowners and personal automobile policy.
Risk Management

The concept of *public liability* is at the heart of the commercial general liability (CGL) policy. While the CGL may protect the insured against liability claims and the attendant costs of defense, the principal beneficiary of these safeguards is an injured and unrelated third party. The CGL exists to provide financial remediation to the injured party.

What public liability may exist for an employee working from their home/office? Well none, if they are not using the home/office to engage the public. On the other hand, if meetings are held in the home/office, regardless of the frequency or formality, the association has what amounts to an uncovered liability exposure. Trips and falls, sexual molestation, scalding hot coffee, dog bites, you need only use a little imagination to add to this list of potential claims. Associations must decide whether to permit employees to make use of their home/office in such a fashion that public liability exposures are introduced.

While it may conflict with an important benefit to the employee of the home/office opportunity, in some cases it may necessary to identify specific work schedules. This can have broad implications on the availability of insurance coverage. Was the employee really going to the post office when they had the automobile accident at 7:30 PM?

Use of association property should also be an important element of the home/office guidelines provided to employees. Used improperly an e-mail account in the name of employee@yourassociation.org, can lead to financial obligations as well as liability claims. Policies and procedures, perhaps even software may be in place at the headquarters location to control and monitor pornographic or copyright protected material downloaded to the association’s computer. The absence of these controls in a home office setting create new and challenging risk management considerations for association managers.
Property Insurance
Most policies provide limited coverage for property that is either temporarily away from the insured premise (at the annual meeting for example) or that is in transit to this location (in the back of your car, at the airport, but not in the hands of the USPS). However, without adjusting policy terms, association property permanently situated in a home/office is not covered property. Associations can obtain coverage by simply providing the carrier with the address of the new “insured location” and a brief description of contents and values. Because the values tend to be fairly low, the cost to extend such coverage is not prohibitive. Associations should be clear about identifying association property and insuring only that property.

Commercial General Liability (CGL)
Adding the home/office as an insured location for CGL is just as simple but not as inexpensive. Associations should expect to pay anywhere from $250 - $400 per home/office location for the purpose of adding them to the CGL. Most associations consider this as a safeguard for the employee. While it is true that the employee benefits from the extension of coverage, it is the interests of the association that are being principally protected.

Worker Compensation
Associations, like all employers, have statutory obligations to provide Worker Compensation insurance for employees. Care should be given in reporting payroll to the insurance company, to be certain that the dollar amount of payroll is identified as being earned in the state in which the employee operates from their home/office. While similar from state to state, Worker Compensation requirements are governed by state statute. In addition premium rates vary from state to state.

Commercial Auto Insurance
Employees working in their home/office and particularly those field employees who make substantive business use of their personal autos should be clear that (unless the association elects otherwise) the association’s automobile liability and physical damage insurance does not cover them for liability or their vehicles for physical damage arising from the employee's business use of the car.
If they choose, associations have a number of alternatives. The association can elect to extend liability coverage to all employees (office based, home based, field personnel, etc) using their personal automobile on company business. This may be impractical as the cost of extending coverage in this fashion, particularly for a large organization, could be prohibitive. Another alternative may be to provide liability coverage only to those employees who are required to make substantive use of their personal automobile on association business. In any event, associations need to communicate to employees that any association extension of insurance coverage is not a substitute for their own personal automobile insurance, which must be maintained by the employee.

**Employee Personal Insurance**

**Homeowners**

It should come as no surprise that a homeowners insurance policy is intended to cover loss arising from events that take place in the insured's home. Both underwriting and pricing considerations are based on the domestic (non-commercial) types of activity. As a result, many homeowners policies exclude claims arising from the commercial use of the home. Associations must advise employees using their home for commercial purposes, such as a home-office, that their homeowners insurance may be jeopardized as a result of this "commercial exposure". Associations should encourage these employees to notify their homeowners insurance carrier of their "commercial" use of the home and to have the carrier issue an endorsement, allowing for the limited use of the home for commercial purposes. The cost of extending such coverage (for home-office type perils) is nominal ranging from $35 to $150 annually. Some associations may elect to pick up the additional premium.

**Personal Automobile Policy**

Like homeowners, personal automobile insurance is rated (among other things) on the basis of personal versus commercial use of the vehicle. All other underwriting considerations equal (type of vehicle, limits of liability and physical damage deductibles, number of miles driven per year, etc) the difference in cost between insuring commercial and personal auto can be as much as 50%. Once again it is essential that employees using their vehicles on company business disclose this "business use" of the vehicle to their insurance carrier. The consequence of not doing so may be that coverage is denied in the event of a claim. Employees making routine and extensive use of their vehicles for association business may need to insure as commercial vehicles. Employees making only limited use of their
vehicles need not insure commercially, but should be encourage to have business use of the vehicle added by endorsement to their personal automobile policy. Premium expense will vary greatly based on many underwriting considerations. Associations may want to consider paying the additional premium expense as well as agreeing to fund the deductible expense of a physical damage claim arising while the employee was using their car on association business.